



8011-01p
SECURITIES AND EXCHANGE COMMISSION
(Release No. 34-68576; File No. SR-Phlx-2012-145)

January 3, 2013

Self-Regulatory Organizations; NASDAQ OMX PHLX LLC; Notice of Filing and Immediate Effectiveness of Proposed Rule Change to Amend its Fee Schedule for the Following Direct Data Feed Products: Top of Phlx Options Data Feed, the Top of Phlx Options Plus Orders Data Feed, the PHLX Orders Data Feed and the PHLX Depth of Market Data Feed

Pursuant to Section 19(b)(1) of the Securities Exchange Act of 1934 (“Act”)¹, and Rule 19b-4 thereunder,² notice is hereby given that on December 21, 2012, NASDAQ OMX PHLX LLC (“Phlx” or “Exchange”) filed with the Securities and Exchange Commission (“SEC” or “Commission”) the proposed rule change as described in Items I, II, and III, below, which Items have been prepared by the Exchange. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization’s Statement of the Terms of the Substance of the Proposed Rule Change

The Exchange proposes to amend its fee schedule for the four direct data feed products.

While changes to the Pricing Schedule pursuant to this proposal are effective upon filing, the Exchange has designated the proposed amendment to be operative on January 2, 2013.

The text of the proposed rule change is below. Proposed new language is italicized; proposed deletions are bracketed.³

* * * * *

IX. Proprietary Data Feed Fees

¹ 15 U.S.C. 78s(b)(1).

² 17 CFR 240.19b-4.

³ Changes are marked to the rules of PHLX are found at <http://nasdaqomxphlx.cchwallstreet.com/>.

Top of PHLX Options ("TOPO")

Account Type	Monthly Charge
Internal Distributor	\$2,000
External Distributor	\$2,500
<u>Non-Professional Subscriber</u>	<u>\$1</u>
<u>Professional Subscriber</u>	<u>\$40</u>

• A Non-Professional Subscriber is a natural person who is neither: (i) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an "investment adviser" as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt. A Non-Professional Subscriber may only use the data provided for personal purposes and not for any commercial purpose.

• A Professional Subscriber is any Subscriber that is not a Non-Professional Subscriber. If the NASDAQ OMX Subscriber agreement is signed in the name of a business or commercial entity, such entity would be considered a Professional Subscriber.

• The Monthly Charge per Subscriber (both Professional and Non-Professional) covers the usage of all four PHLX data products and will not be assessed separately for each data product. PHLX data is comprised of Top of Phlx Options ("TOPO"), TOPO Plus Orders, PHLX Orders and PHLX Depth Data feeds. For example, if a firm has one Professional (Non-Professional) Subscriber accessing TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market the firm would only report the Subscriber once and pay \$40 (\$1 for Non-Professional).

• A "distributor" of NASDAQ OMX PHLX data is any entity that receives a feed or data file of data directly from NASDAQ OMX PHLX or indirectly through another entity and then distributes it either internally (within that entity) or externally (outside that entity). All distributors shall execute a NASDAQ OMX Subscriber agreement.

Non-Display Enterprise License

The \$10,000 per month Non-Display Enterprise License fee permits distribution to an unlimited number of internal non-display Subscribers without incurring additional fees for each internal Subscriber. The Non-Display Enterprise License covers non-display Subscriber fees for all PHLX proprietary direct data feed products and is in addition to any other associated distributor fees for PHLX proprietary direct data feed products.

Managed Data Solutions

The charges to be paid by Distributors and Subscribers of Managed Data Solutions products containing Top of PHLX Options shall be:

Fee schedule for Managed Data Solutions	Price
Managed Data Solution Administration Fee (for the right to offer Managed Data Solutions to client organizations)	\$1,500/mo Per Distributor
PHLX Managed Data Solution Subscriber Fee	\$250/mo per Subscriber

TOPO Plus Orders

Account Type	Monthly Charge
Internal Distributor	\$4,000
External Distributor	\$5,000
Non-Professional Subscriber	\$1
Professional Subscriber	\$[2]40

[• The Monthly Charge and Subscriber Fees applicable to TOPO Plus Orders users are effective beginning June 1, 2010.]

[• The Monthly Charge applicable to Internal Distributors of TOPO Plus Orders will apply to Specialized Order Feed users that have not migrated to TOPO Plus Orders on or before June 1, 2010.]

[• A Non-Professional Subscriber is a natural person who is neither: (i) registered or qualified in any capacity with the Commission, the Commodities Futures Trading Commission, any state securities agency, any securities exchange or association, or any commodities or futures contract market or association; (ii) engaged as an "investment adviser" as that term is defined in Section 201(11) of the Investment Advisors Act of 1940 (whether or not registered or qualified under that Act); nor (iii) employed by a bank or other organization exempt from registration under federal or state securities laws to perform functions that would require registration or qualification if such functions were performed for an organization not so exempt. A Non-Professional Subscriber may only use the data provided for personal purposes and not for any commercial purpose.]

[• A Professional Subscriber is any Subscriber that is not a Non-Professional Subscriber. If the NASDAQ OMX Subscriber agreement is signed in the name of a business or commercial entity, such entity would be considered a Professional Subscriber.]

PHLX Orders

Account Type	Monthly Charge
Internal Distributor	\$3,000
External Distributor	\$3,500
<u>Non-Professional Subscriber</u>	<u>\$1</u>
<u>Professional Subscriber</u>	<u>\$40</u>

PHLX Depth Data

Account Type	Monthly Charge
Internal Distributor	\$4,000
External Distributor	\$4,500
<u>Non-Professional Subscriber</u>	<u>\$1</u>
<u>Professional Subscriber</u>	<u>\$40</u>

PHLX Options Trade Outline ("PHOTO")

Account Type	Monthly Charge
End of Day Product Subscriber	\$500
Intra-Day Product Subscriber	\$1,500

PHOTO Historical Data

Account Type	Charge per calendar month Requested
End of Day Product Subscriber	\$400
Intra-Day Product Subscriber	\$750

⁹ For example, a subscriber who requests End of Day PHOTO Historical Data for the Month of March, 2009 would be charged \$400. A subscriber who requests End of Day PHOTO Historical Data for the months of March, 2009 and April, 2009 would be charged \$400 for the March, 2009 End of Day data and \$400 for the April, 2009 End of day data, for a total of \$800, etc. A subscriber who requests Intra-Day PHOTO Historical Data for the Month of March, 2009 would be charged \$750.00. A subscriber who requests Intra-Day PHOTO Historical Data for the months of March, 2009 and April, 2009 would be charged \$750 for the March, 2009 Intra-Day data and \$750 for the April, 2009 Intra-Day data, for a total of \$1,500, etc.

* * * * *

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the Exchange included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The Exchange has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the proposed rule change is to amend the fees for TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data products. TOPO provides Subscribers a direct data feed that includes the Exchange's best bid and offer position, with aggregate size, based on displayable order and quoting interest. The TOPO Plus Orders data feed product combines the TOPO and PHLX Orders data feeds and provides Exchange top-of-market data (including quotes and trades), together with real-time full depth order information. TOPO Plus Orders data enables Subscribers to monitor their order book(s), including single and complex

orders⁴, and Complex Order Live Auction (“COLA”)⁵ for all options listed on PHLX. The PHLX Orders data feed provides the same single and complex order information described above that makes up the “Plus Orders” portion of the TOPO Plus Orders data product. The PHLX Depth of Market data feed includes full depth of quotes and orders, imbalance information and last sale data for options listed on PHLX.⁶

The Exchange proposes to modify the method for assessing fees for Professional Subscribers. Currently, the Exchange assesses a \$20 monthly fee for Professional Subscribers to TOPO Plus Orders. There is currently no monthly Professional Subscriber fee for TOPO, PHLX Orders, or PHLX Depth of Market.⁷

The Exchange proposes to establish a single monthly Professional Subscriber fee of \$40 that will entitle such Subscriber to access all PHLX data feeds. This will increase the monthly Professional Subscriber Fee on TOPO Plus Orders from \$20 to \$40 per Subscriber, however it will simultaneously add access to the remaining PHLX data feeds. The proposal will result in the Exchange for the first time assessing a \$40 per month fee for Professional Subscribers of TOPO, PHLX Orders and PHLX Depth of Market. Professional Subscribers will pay the monthly

⁴ A Complex Order is an order involving the simultaneous purchase and/or sale of two or more different options series in the same underlying security, priced as a net debit or credit based on the relative prices of the individual components, for the same account, for the purpose of executing a particular investment strategy. See Exchange Rule 1080.08(a)(i).

⁵ See Exchange Rule 1080.08(e).

⁶ PHLX Depth of Market is the equivalent of, and is based on, the NASDAQ ITCH to Trade Options or “ITTO” data feed that NASDAQ offers under NASDAQ Options Market (“NOM”) Rules, Chapter VI, Section 1(a)(3)(A). See Securities Exchange Act Release No. 63983 (February 25, 2011), 76 FR 12178 (March 4, 2011) (SR-NASDAQ-2011-032).

⁷ Phlx proposes to move the definitions in the rule text above without changing the meaning of the definitions.

Subscriber fee once for access to any or all of the current data feeds of PHLX data. For example, the firm would only report the Professional Subscriber once and pay \$40 for access to TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market.

Similarly, the Exchange is modifying the method for assessing Non-Professional Subscriber fees. Presently, the monthly Subscriber Fee assessed to External Distributors for TOPO Plus Orders is \$1 per Non-Professional Subscriber. The Exchange now proposes to assess a monthly Subscriber Fee of \$1 per Non-Professional Subscriber to External Distributors for TOPO, PHLX Orders and PHLX Depth of Market. Similar to the inclusive fee for Professional Subscribers, Non-Professional Subscribers will pay the monthly fee of \$1 to access any or all of the data feeds of PHLX data. The Exchange believes that by allowing access to multiple products for one price, it will allow for a broad dissemination of PHLX data overall and a wider range of consumer choice.

Finally, the Exchange proposes to establish a monthly Non-Display Enterprise License fee of \$10,000. This enterprise license will entitle a distributor to provide market data to an unlimited number of internal non-display devices within a firm rather than incurring per Subscriber charges.⁸ This pricing structure offers two advantages. First, it establishes a monthly fee cap for distributors with large customer bases, effectively lowering average cost per user and marginal costs per user beyond the monthly breakpoint. Second, the enterprise license offers administrative ease by eliminating the need for distributors to tally, track, and report to the

⁸ The foregoing fee structure is similar to the structure in place for the NASDAQ Options Market (“NOM”) enterprise license which entitles a distributor to provide BONOSM and ITTO market data to an unlimited number of non-display devices within the firm without any per Subscriber charge. See NASDAQ Options Rules, Chapter XV, Sec. 4 (a) NASDAQ Options Market Data Distributor Fees.

Exchange a specific number of individual users. This is a voluntary option; distributors are permitted to choose between existing pricing and the new enterprise license.

The Exchange notes that the categories of TOPO, PHLX Orders, PHLX Depth of Market or TOPO Plus Orders market data and fees compete with similar products offered by other markets such as International Stock Exchange (“ISE”), NYSE, NOM and Chicago Board Options Exchange (“CBOE”). For example, ISE offers market data products that are similar to TOPO: a data feed that shows the top of the market entitled TOP Quote Feed, and a data feed that shows the top five price levels entitled Depth of Market. NYSE offers a market data product for Arca and Amex that is similar to TOPO and PHLX Depth of Market: a feed that shows top of book, last sale, and depth of quote and is entitled NYSE Arca Book for Options. A subsidiary of CBOE for which CBOE charges fees offers a market data feed that is similar to TOPO and shows BBO, last sale, and top of book data. And BATS offers Multicast PITCH, which is their depth of market and last sale feed similar to PHLX Depth of Market.

2. Statutory Basis

Phlx believes that the proposed rule change is consistent with the provisions of Section 6 of the Act,⁹ in general, and with Section 6(b)(4) and 6(b)(5) of the Act,¹⁰ in particular, in that it provides an equitable allocation of reasonable fees among Subscribers and recipients of PHLX data and is not designed to permit unfair discrimination between them. In adopting Regulation NMS, the Commission granted self-regulatory organizations and broker-dealers increased authority and flexibility to offer new and unique market data to the public. It was believed that

⁹ 15 U.S.C. 78f.

¹⁰ 15 U.S.C. 78f(b)(4) and (5).

this authority would expand the amount of data available to consumers, and also spur innovation and competition for the provision of market data.

The Commission concluded that Regulation NMS—by deregulating the market in proprietary data—would itself further the Act’s goals of facilitating efficiency and competition:

[E]fficiency is promoted when broker-dealers who do not need the data beyond the prices, sizes, market center identifications of the NBBO and consolidated last sale information are not required to receive (and pay for) such data. The Commission also believes that efficiency is promoted when broker-dealers may choose to receive (and pay for) additional market data based on their own internal analysis of the need for such data.¹¹

By removing “unnecessary regulatory restrictions” on the ability of exchanges to sell their own data, Regulation NMS advanced the goals of the Act and the principles reflected in its legislative history. If the free market should determine whether proprietary data is sold to broker-dealers at all, it follows that the price at which such data is sold should be set by the market as well.

TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data products are precisely the sort of market data products that the Commission envisioned when it adopted Regulation NMS.

On July 21, 2010, President Barack Obama signed into law H.R. 4173, the Dodd- Frank Wall Street Reform and Consumer Protection Act of 2010 (“Dodd-Frank Act”), which amended Section 19 of the Act. Among other things, Section 916 of the Dodd-Frank Act amended paragraph (A) of Section 19(b)(3) of the Act by inserting the phrase “on any person, whether or not the person is a member of the self-regulatory organization” after “due, fee or other charge imposed by the self-regulatory organization.” As a result, all self-regulatory organization (“SRO”) rule proposals establishing or changing dues, fees, or other charges are immediately

¹¹ Securities Exchange Act Release No. 51808 (June 9, 2005), 70 FR 37496 (June 29, 2005).

effective upon filing regardless of whether such dues, fees, or other charges are imposed on members of the SRO, non-members, or both. Section 916 further amended paragraph (C) of Section 19(b)(3) of the Act to read, in pertinent part, “At any time within the 60-day period beginning on the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) [of Section 19(b)], the Commission summarily may temporarily suspend the change in the rules of the self-regulatory organization made thereby, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title. If the Commission takes such action, the Commission shall institute proceedings under paragraph (2)(B) [of Section 19(b)] to determine whether the proposed rule should be approved or disapproved.”

The decision of the United States Court of Appeals for the District of Columbia Circuit in NetCoalition v. SEC, No. 09-1042 (D.C. Cir. 2010), although reviewing a Commission decision made prior to the effective date of the Dodd-Frank Act, upheld the Commission’s reliance upon competitive markets to set reasonable and equitably allocated fees for market data. “In fact, the legislative history indicates that the Congress intended that the market system ‘evolve through the interplay of competitive forces as unnecessary regulatory restrictions are removed’ and that the SEC wield its regulatory power ‘in those situations where competition may not be sufficient,’ such as in the creation of a ‘consolidated transactional reporting system.’ ” NetCoalition, at 15 (quoting H.R. Rep. No. 94–229, at 92 (1975), *as reprinted in* 1975 U.S.C.C.A.N. 321, 323). The court’s conclusions about Congressional intent are therefore reinforced by the Dodd-Frank Act amendments, which create a presumption that exchange fees, including market data fees, may take effect immediately, without prior Commission approval, and that the Commission should take action to suspend a fee change and institute a proceeding to determine whether the fee

change should be approved or disapproved only where the Commission has concerns that the change may not be consistent with the Act.

Phlx believes that the proposed fee is fair and equitable in accordance with Section 6(b)(4) of the Act, and not unreasonably discriminatory in accordance with Section 6(b)(5) of the Act. As described above, the proposed fee is based on pricing conventions and distinctions that exist in Phlx's current fee schedule, and the fee schedules of other exchanges. These distinctions (top-of-book versus Depth-of-Book, Professional versus non-Professional Subscribers, and Internal versus External Distribution) are each based on principles of fairness and equity that have helped for many years to maintain fair, equitable, and not unreasonably discriminatory fees, and that apply with equal or greater force to the current proposal. The use of enterprise licenses is also a well-established method for assessing equitable fees, providing as it does a pricing and administrative efficiency benefit for high-volume usage.

Importantly, the proposed products are entirely optional to all parties. Firms are not required to purchase TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed or to utilize any specific pricing alternative if they do choose to purchase TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed. Phlx is not required to make TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed available or to offer specific pricing alternatives for potential purchases. Phlx can discontinue offering a pricing alternative (as it has in the past) and firms can discontinue their use at any time and for any reason (as they often do), including due to their assessment of the reasonableness of fees charged. Phlx continues to establish and revise pricing policies aimed at increasing fairness and equitable allocation of fees among Subscribers. If the market deems the proposed fees to be unfair or inequitable, firms can diminish or discontinue their use of this data.

Phlx believes that periodically it must adjust TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed Enterprise Data Subscriber fees to reflect market forces. Given that this fee change represents the first Professional and Non-Professional Subscriber price change to TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data products, Phlx believes it is an appropriate time to adjust these fees to more accurately reflect the investments made to enhance this product through capacity upgrades and data sets added. This also reflects that the market for TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed information is highly competitive and continually evolves as products develop and change.

B. Self-Regulatory Organization's Statement on Burden on Competition

Phlx does not believe that the proposed rule change will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act, as amended. To the contrary, the market for options orders and executions is already highly competitive and Phlx's proposal is itself pro-competitive in several ways. First, TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed offer a comprehensive, competitive alternative to the consolidated data OPRA feed for users and situations where consolidated data is unnecessary. Second, Phlx believes that offering TOPO, TOPO Plus Orders, PHLX Orders and PHLX Depth of Market data feed will help attract new Subscribers and new order flow to the Phlx market, thereby improving execution quality and Phlx's ability to compete in the market for options order flow and executions.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants, or Others

No written comments were either solicited or received.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change has become effective pursuant to Section 19(b)(3)(A)(ii) of the Act.¹² At any time within 60 days of the filing of the proposed rule change, the Commission summarily may temporarily suspend such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act. If the Commission takes such action, the Commission shall institute proceedings to determine whether the proposed rule should be approved or disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing, including whether the proposed rule change is consistent with the Act. Comments may be submitted by any of the following methods:

Electronic comments:

- Use the Commission's Internet comment form (<http://www.sec.gov/rules/sro.shtml>); or
- Send an e-mail to rule-comments@sec.gov. Please include File Number SR-Phlx-2012-145 on the subject line.

Paper comments:

- Send paper comments in triplicate to Elizabeth M. Murphy, Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549.

All submissions should refer to File Number SR-Phlx-2012-145. This file number should be included on the subject line if e-mail is used. To help the Commission process and review your comments more efficiently, please use only one method. The Commission will post all

¹² 15 U.S.C. 78s(b)(3)(A)(ii).

comments on the Commission's Internet website (<http://www.sec.gov/rules/sro.shtml>). Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549, on official business days between the hours of 10:00 a.m. and 3:00 p.m. Copies of such filing also will be available for inspection and copying at the principal office of the Exchange. All comments received will be posted without change; the Commission does not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly. All submissions should refer

to File Number SR-Phlx-2012-145 and should be submitted on or before [insert date 21 days from publication in the Federal Register].

For the Commission, by the Division of Trading and Markets, pursuant to delegated authority.¹³

Kevin M. O'Neill
Deputy Secretary

[FR Doc. 2013-00255 Filed 01/08/2013 at 8:45 am; Publication Date: 01/09/2013]

¹³ 17 CFR 200.30-3(a)(12).